In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1931

NATIONAL DYNAMICS CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 492 F. 2d 1333. The order and opinion of the Federal Trade Commission (C.A. App. 94a-124a[1]) are reported at 82 F.T.C. 488, 545

JURISDICTION

In a decision dated March 6, 1974 (Pet. App. A), the court of appeals held (Pet. App. A6):

> The petition to review is denied except with respect to Paragraphs 1 and 2 of the order which are remanded to the Commission for reformulation in accordance with this opinion. No costs.

---

[1]"C.A. App." refers to petitioners' appendix in the court of appeals.

On the same day the court notified counsel by letter (Appendix; *infra*) that:

> The Court has today handed down a decision in the above entitled case denying petition in part, and remanding cause in part.
>
> * * * * *
>
> Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.
>
> * * * * *

No separate judgment was entered. On motion of the Federal Trade Commission for a more specific judgment enforcing all the paragraphs not remanded, *i.e.*, paragraphs 3-6 (only paragraphs 1, 2, 4, and 6 had been specifically mentioned in the opinion), the court entered a judgment dated March 28, 1974, affirming and enforcing paragraphs 3-6 of the Commission's order (Pet. App. C). The petition for a writ of certiorari was filed on June 24, 1974. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

The timeliness of the petition is discussed *infra*, p. 5.

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari is untimely.

2. Whether the Federal Trade Commission, upon finding that petitioners had violated Section 5 of the Federal Trade Commission Act by making misleading representations that advertised product claims were supported by laboratory tests, acted within its discretion in ordering petitioners, *inter alia*, (1) to cease and desist from representing that claims are supported by independent labora-

tory tests unless the claim has in fact been substantiated by a "competent scientific test," and (2) to deliver a copy of the cease-and-desist order to all persons selling petitioners' product.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, is set forth in pertinent part in Pet. App. B.

STATEMENT

Petitioners market a battery additive, VX-6. The Federal Trade Commission determined that petitioners' advertising of VX-6 was misleading and deceptive, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (C.A. App. 99a-124a). The Commission found that the advertisements contained numerous claims concerning the short term and long term beneficial effects of VX-6[2] and represented that VX-6 had been tested by independent laboratories; but that the laboratory tests did not support the claims relating to long term effects (C.A. App. 117a). The Commission found the advertisements misleading because (C.A. App. 116a; footnote omitted):

> [A]dvertisements which expressly or impliedly represent the product as laboratory tested, without qualification, and then proceed to describe the performance characteristics of the product, have a tendency and capacity to lead the public to believe that the laboratories have fully tested the product

---

[2]The respresentations as to long term benefits include: (1) Ends battery trouble forever. (2) Assures like-new operation of batteries for the life of the car. (3) Makes new batteries trouble free for five years or more. (4) Reserve power is endless (C.A. App. 112a).

for each of the performance attributes claimed in the advertisement.

The Commission ordered petitioners, *inter alia,* to cease and desist from (C.A. App. 95a-96a):

> 4. Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited, the product tested, instruments used, test procedures, data, and results of such test.
>
> * * * * *
>
> 6. Failing to deliver a copy of this order to cease and desist to all present salesmen or other persons engaged in the sale of respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of such test.

In adopting paragraph 6 the Commission noted (C.A. App. 124a):

> In our judgment, it is necessary to inform these distributors of the Commission's order to provide adequate protection against the continuation of the deception made possible through [petitioners'] dissemination of deceptive advertising literature.

In a *per curiam* opinion, the Court of Appeals for the Second Circuit denied the petition to review except as to paragraphs 1 and 2; it upheld paragraphs 4 and 6, the paragraphs at issue here (Pet. App. A1-A6; Pet. 9, 12).

ARGUMENT

1. On March 6, 1974, the court of appeals rendered its opinion, the concluding paragraph of which "denied" the petition for review "except with respect to Paragraphs 1 and 2" of the Commission's order. On the same day, the court notified counsel that "[j]udgment has been entered today." The time for filing a petition for a writ of certiorari was not extended, and, accordingly, the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on June 4, 1974. The petition was filed on June 24, 1974, and was thus out of time unless the time for petitioning ran from the judgment entered on March 28, 1974.

That judgment, however, made no change in the court's previous affirmance of paragraphs 4 and 6 of the Commission's order, the only portion of the decision which petitioners seek to review. The validity of those paragraphs was finally upheld in the court's original judgment of March 6, 1974, and the subsequent judgment made no change in that determination. Accordingly, the time for filing a petition for a writ of certiorari ran from the date of that first judgment. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212-213. The petition is therefore untimely.

2. In any event, this case presents no issue warranting further review. Petitioners do not challenge the Commission's holding that the advertisements violate Section 5 of the Federal Trade Commission Act, but take issue only with paragraphs 4 and 6 of the order. The

Commission, however, has wide discretion in determining what remedy is necessary to eliminate unfair or deceptive trade practices, and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission* 327 U.S. 608, 611-613.[3] The court of appeals correctly upheld paragraphs 4 and 6 as clear and closely related to the unlawful practices found.

Petitioners contend (Pet. 9-11) that the term "competent scientific test" in paragraph 4 is vague and that the Commission erred in failing to provide an objective standard for scientific testing. They argue that advertisers rely upon testing laboratories to evaluate the competency of their own tests, and that it is inappropriate, without promulgating an objective standard, to hold the advertisers liable for the competency of these tests.[4] Petitioners' violations, however, were not in misrespresenting as "scientific" tests that were not of that character, but in making particular claims that the scientifc tests did not support. To comply with the order, petitioners need only limit their claims to those that the scientific tests sustain.[5]

---

[3]See also: *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473-476; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395; and *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431.

[4]The Commission's requirement that product performance claims be supported by "competent scientific tests" was previously upheld in *The Firestone Tire and Rubber Company* v. *Federal Trade Commission*, 481 F. 2d 246 (C.A. 6), certiorari denied, 414 U.S. 1112, affirming 81 F.T.C. 398.

[5]Petitioners also argue (Pet. 11) that because the Commission found that the laboratories used by petitioners were *bona fide* and independent and because the Administrative Law Judge found that the reports of these labor-

Finally, petitioners argue (Pet. 12-13) that the requirement of paragraph 6 that each salesman of VX-6 be served with a copy of the order is unduly burdensome, because such distributors will in time receive new literature which complies with the order. As the court of appeals noted, however (Pet. App. A6):

> [D]istributors may have a supply of old materials and may not confine themselves to the written word. Since the copies of the order can be delivered along with the revised advertising material, the only burden on [petitioners] is of using certified mail so as to obtain a receipt. To impose this requirement is well within the broad power confided to the FTC in framing remedial orders.

---

atories were in the standard form for commercial laboratories, "the imposition of paragraph 4, is unrelated to any violation of law committed by petitioners." The Commission found, however, that the advertisements mislead the public by giving the impression that each of the claims relating to product efficacy had been fully tested by independent laboratories when in fact the tests did not extend to some of the claims (C.A. App. 116a-117a). Requiring petititoners to support claims by a "competent scientific test" is therefore reasonably related to the unlawful practices involved.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
ROGER B. ANDEWELT,
Attorneys.

CALVIN J. COLLIER
General Counsel,
JOHN T. FISCHBACH,
Attorney,
Federal Trade Commission.

OCTOBER 1974.

APPENDIX

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES COURTHOUSE

FOLEY SQUARE

NEW YORK 10007

DANIEL FUSARO

CLERK. Phone 264-6471

March 6, 1974

NATIONAL DYNAMICS CORP. etc. ET AL.

vs.

FEDERAL TRADE COMMISSION

Cal. No. 355

Dear Sirs:

The Court has today handed down a decision in the above entitled cause denying petition in part, and remanding cause in part.

A copy of the opinion will be mailed to you tomorrow.

Additional copies of opinions may be obtained from this office in accordance with § 0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39 (c) F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. DANIEL FUSARO

Clerk